INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	4
Conclusion	8

Cases:

American Express Co. v. *Mullins*, 212 U. S. 311	5
Baltimore S. S. Co. v. *Phillips*, 274 U. S. 316	7
Brailas v. *United States*, 79 Supp. 963	6
Bruszewski v. *United States*, 181 F. 2d 419, certiorari denied, 340 U. S. 865	4, 6
Caldarola v. *Eckert*, 332 U. S. 155	6
Case v. *Beauregard*, 101 U. S. 688	5
Chicot County Dist. v. *Bank*, 308 U. S. 371	5
Cosmopolitan Co. v. *McAllister*, 337 U. S. 783	5
Grubb v. *Public Utilities Commission*, 281 U. S. 470	7
Hurn v. *Oursler*, 289 U. S. 238	7
Hust v. *Moore-McCormack Lines*, 328 U. S. 707	6
Jackson v. *Irving Trust Co.*, 311 U. S. 494	7
Momand v. *Universal Film Exchanges*, 172 F. 2d 37, certiorari denied, 336 U. S. 967, rehearing denied, 337 U. S. 934	6
Sunshine Coal Co. v. *Adkins*, 310 U. S. 381	5

Miscellaneous:

American Law Institute, *Restatement, Judgments* (1942), § 63, *comment* b	7
General Agency Agreement, Art. 8, 46 C.F.R., Cum. Supp. 306.44, Art. 8	5
Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 24	7

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 470

CORNELIUS ADRIAANSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States District Court for the Eastern District of New York (R. 46) is not reported. The opinion of the Court of Appeals for the Second Circuit (R. 48) is reported at 184 F. 2d 968.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1950 (R. 52). The petition for a writ of certiorari was filed on December 28, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether, after a trial resulting in a judgment on the merits against the plaintiff and in favor of the defendant, the same plaintiff may relitigate the identical issue of liability arising out of the same facts and circumstances in another suit against a second defendant who was under an obligation to indemnify the first defendant for any damages which the plaintiff might have recovered in his first action.

STATEMENT

Petitioner, a seaman, suffered personal injuries while working aboard the *S. S. Leonard L. Romero,* a vessel owned by the United States and serviced by Polarus Steamship Company under the standard General Agency Agreement. Claiming that his injuries were caused by the negligence of the operator of the vessel, petitioner instituted an action in the District Court for the Southern District of New York against the General Agent, as the operating principal responsible for the acts of the crew and the condition of the ship (R. 31-34). The complaint alleged that "* * * the defendant caused, allowed and permitted the gangway and its appurtenances to become and remain in a poor, broken, loose, defective and otherwise dangerous condition, all of which resulted in the infant plaintiff's foot being caught between the gangway and the stanchion * * *" (R. 33). The complaint was amended at the beginning of the trial to read that the plaintiff's foot was caught between "the gangway and the deck" (R. 45).

At the trial, petitioner testified that the gangway, while being moved from one side of the ship to the other, fell upon his foot when the line leading

from the winch suddenly slackened. The testimony for the General Agent, on the other hand, was that the injury occurred because of petitioner's negligence, *i.e.*, that the gangway became stuck in a stanchion while being moved and that petitioner caught his foot between the stanchion and the gangway and was injured when he attempted, although not ordered to do so, to free the gangway by kicking it with his foot (R. 21, 39).

Upon the evidence thus presented, the district judge charged the jury that (R. 41) "* * * You are not to speculate on how this accident happened. The plaintiff has alleged that it happened in a certain manner, and he stands or falls on that. * * *"[1] In accordance with this charge, the jury, being unable to agree as to how the accident occurred although the majority were in agreement that there had been some negligence on the part of the vessel's operator, returned a verdict for the General Agent (R. 20-21, 43).[2] No appeal was taken by petitioner (R. 22).

The present action was then brought against the United States by libel filed on May 19, 1948, in the District Court for the Eastern District of New York (R. 6). This libel, as stipulated to by the parties, is "* * * based upon the identical injury

[1] The case was submitted to the jury on the merits without any charge with respect to whether the General Agent was the vessel's operator and petitioner's employer, so as to be the proper defendant (R. 27, 45).

[2] Prior to rendering a verdict against petitioner, the jury returned for further instructions and clarification of the judge's charge. At this time, petitioner attempted to amend his complaint so that it alleged in the alternative that petitioner's foot was caught between the gangway and the deck, "or between the gangway and the stanchion." (R. 19-20). This requested amendment was refused (R. 21).

and identical claim of unseaworthiness and negligence of fellow-employees and officers, with the exception of a difference as to the facts allegedly causing the accident * * *." (R. 44). It differs in that it alleges that "* * * the respondent caused, allowed and permitted the gangway and its appurtenances to become and remain in a poor, broken, loose, defective and otherwise dangerous condition, all of which resulted in the libelant's foot being caught between the gangway and the deck *or stanchion* * * *" [emphasis added] (R. 8).[3]

Upon the plea of the United States that the decision in the prior proceeding was *res judicata,* the libel was dismissed by the district court (R. 46). The court below, after independently examining the question presented, concurred in the result reached by the Court of Appeals for the Third Circuit in *Bruszewski* v. *United States,* 181 F. 2d 419, certiorari denied, 340 U. S. 865, and affirmed the decision of the district court (R. 48-51).

ARGUMENT

Petitioner advances substantially the same arguments presented to this Court in *Bruszewski* v. *United States,* No. 260, this Term, certiorari denied, 340 U. S. 865. We submit that the reasons which justified the denial of the writ of certiorari in the *Bruszewski* case are equally applicable here, and that further review is not warranted.

1. Petitioner concedes that one whose liability is wholly derivative may claim the benefit of a

[3] In all other material allegations, the prior complaint and the present libel are identical. Compare paragraph 9 of the complaint (R. 32-33) with paragraph 13 of the libel (R. 8).

judgment in favor of the person from whom his liability is derived (Pet. 8, 15). And admittedly (Pet. 7, 14), as the court below pointed out, at the time judgment was rendered in the prior action, "the United States would apparently have been liable as principal and would also have been obliged under the General Agency Agreement to indemnify the operating agent against any liability imposed upon it." (R. 51).[4] Petitioner contends, however, that, as a consequence of this Court's subsequent holding in *Cosmopolitan Co.* v. *McAllister,* 337 U. S. 783, a General Agent is not personally liable to a seaman for injury caused by the negligence of the vessel's master or crew, the United States was therefore never derivatively liable, and the prior judgment was void *ab initio* (Pet. 7-8, 14-15).

As the court below observed (R. 51) "such an argument 'has more ingenuity than merit.' " Even an erroneous determination as to the constitutionality of a statute may be *res judicata* in a subsequent proceeding between the same parties on the same cause of action. *Chicot County Dist.* v. *Bank,* 308 U. S. 371. It is well established that "a judgment is conclusive as to all the *media concludendi,* * * * and it needs no authority to show that it cannot be impeached * * * by showing that it was based upon a mistake of the law." *American Express Co.* v. *Mullins,* 212 U. S. 311, 314; cf. *Case* v. *Beauregard,* 101 U. S. 688, 692; *Sunshine Coal Co.*

---

[4] Article 8 of the General Agency Agreement provides that the United States "* * * shall defend, indemnify and save harmless the General Agent against and from any and all loss, liability, damage and expense (including costs of court and reasonable attorneys' fees) on account of * * *" risks and liabilities incurred in the course of operation of the vessel. 46 C.F.R. Cum. Supp. 306.44, Art. 8.

v. *Adkins,* 310 U. S. 381, 403. As has been pointed out in a situation on all fours with the instant case, "the * * * [prior] trial was not deprived of legal significance by the * * * [*McAllister*] case any more than it would have been affected by a subsequent statute changing the responsibility of 'agents' similarly situated. The issue of negligence in the * * * [prior] case was real and its decision was legally significant. The * * * [*McAllister*] decision did not in any sense vacate or set aside the * * * [prior] judgment." *Bruszewski* v. *United States,* 181 F. 2d 419, 423 (C. A. 3), certiorari denied, 340 U. S. 865; accord, *Brailas* v. *United States,* 79 Supp. 963 (S.D. N.Y.);[5] cf. *Momand* v. *Universal Film Exchanges,* 172 F. 2d 37, 47 (C. A. 1), certiorari denied, 336 U. S. 967, rehearing denied, 337 U. S. 934, 961.

2. Petitioner's further contention that the judgment in the prior proceeding is not *res judicata* because the present libel presents a different cause of action (Pet. 10-11, 16) is equally untenable. As shown by the stipulation of the parties hereto, the action at bar is "based upon the identical injury and identical claim of unseaworthiness and negli-

[5] Petitioner attempts to distinguish the *Brailas* case on the ground that Judge Rifkind "was governed by the law as laid down by the Supreme Court of the United States in the case of *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707. The ship operator was the owner *pro hac vice* in the *Hust* case, *supra,* consequently, an action against the owner *pro hac vice* had to be concluded as an action against the owner." (Pet. 7, 14). Judge Rifkind's opinion reveals, however, that the libelant in that case, who was represented by petitioner's counsel herein, advanced the identical argument that the former judgment was not a bar "because, had it gone for plaintiff, it would have been set aside under the doctrine of the subsequently decided *Caldarola* case [*Caldarola* v. *Eckert,* 332 U. S. 155]." 79 F. Supp. at 965.

gence of fellow-employees and officers, with the exception of a difference as to the facts allegedly causing the accident" (R. 44). The libel differs only in that it alleges in the alternative that "the libelant's foot [was] caught between the gangway and the deck or stanchion" (R. 8).[6]

In these circumstances, the applicable rule has long been recognized by this Court. "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear.'" *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316, 321; *Grubb* v. *Public Utilities Commission,* 281 U. S. 470, 479; *Hurn* v. *Oursler,* 289 U. S. 238, 246; see also American Law Institute, *Restatement, Judgments* (1942), § 63, *comment b;* Scott, *Collateral Estoppel by Judgment,* 56 Harv. L. Rev. 1, 24.[7]

---

[6] In all other material respects, the allegations are identical. Compare paragraph 9 of the complaint (R. 32-33) with paragraph 13 of the libel (R. 8).

[7] The substance of petitioner's argument in this respect appears to be that the district judge erred in his charge to the jury in confining the jury's attention to petitioner's version of the accident. Even assuming that "the District Court had erred in dealing, or in failing to deal, with any issue thus involved, the remedy was by appeal and no appeal was taken." *Jackson* v. *Irving Trust Co.,* 311 U. S. 494, 503.

CONCLUSION

The decision of the court below is correct and there is no conflict. The petition for writ of certiorari should, therefore, be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
NEWELL A. CLAPP,
Acting Assistant Attorney General.
PAUL A. SWEENEY,
BENJAMIN FORMAN,
Attorneys.

FEBRUARY, 1951

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 927107 501

DEC 23 1950

IN THE

Supreme Court of the United States

October Term, 1950

No. 470

CORNELIUS ADRIAANSE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JACOB RASNER,
Proctor for Libelant-Appellant.

ROBERT KLONSKY,
Of Counsel.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y. 7, BARCLAY 7-0349

49

INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI:

OPINION BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

STATEMENT 2

FACTS 2

SPECIFICATION OF ERRORS TO BE URGED 5

REASONS FOR GRANTING THE WRIT 6

1. The Court below erred in affirming the dismissal of the libel on the third exceptive allegation asserting *res judicata,* as that which is void *ab initio* may not be construed as legal authority for court action 6

2. As the factual issue presented in the case at bar was specifically removed from the jury's consideration in the civil action, it follows that the decision of the Court below conflicts with the general rue that there must be identity of causes of action for dismissal under the doctrine of *res judicata* 10

CONCLUSION 12

BRIEF IN SUPPORT OF PETITION:

POINT I—The Court erred in sustaining the third exceptive allegation asserting *res adjudicata,* as that which is void *ab initio* may not be construed as legal authority for court action 14

POINT II—The factual issue presented in the case at bar was specifically removed from the jury's consideration in the civil action 16

CONCLUSION 17

INDEX OF CASES

PAGE

Bigelow v. Old Dominion Copper Mining Company, 225 U. S. 111 ..... 6, 9
Brady v. Roosevelt Steamship Co., 317 U. S. 575 .....7, 14
Brailas v. United States, 79 F. Supp. 963 ....2, 7, 13, 14, 17
Bruszewski v. United States, 181 Fed. (2) 419 11

Casey v. American Export Lines, Inc., 176 Fed. (2) 337 .....8, 15
Chase National Bank v. City of Norwalk, 291 U. S. 431 10
Cragin and Company Inc. v. International Steamship Company, 15 Fed. (2) 263 6

Geekie v. Kirby C. Company, 106 U. S. 379 6

Hartford Accident & Indemnity Company v. Nelson Mfg. Co., 291 U. S. 352 10
Hust v. Moore McCormack Lines, 328 U. S. 707 ....7, 14, 17

McAllister v. Cosmopolitan Steamship Co., 337 U. S. 783 .....5, 6, 7, 13, 14, 15
Myers v. International Trust Company, 263 U. S. 64..6, 11

Portland Gold Mining Company v. Stratton's Independence, 158 Fed. 63 6

Tait v. Western Maryland Railway Company, 289 U. S. 620 6

United Shoe Machinery Corporation v. United States, 258 U. S. 451 .....6, 11

Statute

28 U. S. C. 1254(1) 1

Authority

Blashfields Cyclopedia of Automobile Law and Practice, Vol. 9, Sec. 5835, page 111 8

IN THE

Supreme Court of the United States

October Term, 1950

No.

CORNELIUS ADRIAANSE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Cornelius Adriaanse, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on November 9, 1950.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, not yet officially reported, Docket No. 21687, was decided on November 9, 1950.

Jurisdiction

The judgment of the Court of Appeals was entered on the 9th day of November, 1950. The jurisdiction of this Court is invoked under 28 U. S. C., 1254 (1).

Questions Presented

(1) Whether a judgment of dismissal in an action against the general agent is a bar to a subsequent action against the real owner and the only party who can be held liable, under the doctrine of *res judicata,* where there is a lack of mutuality of estoppel?

(2) Can the doctrine of *res judicata* be applied to an admiralty action against the United States of America, when, in a civil action against the general agent arising out of the same facts and circumstances, a juror speaking for the majority of the jury, stated that the general agent was negligent, but that they were limited in finding for the plaintiff by reason of the Trial Judge's charge?

Statement

This is an appeal from an affirmance of a final decree dismissing a libel upon the denial of libelant-petitioner's motion to vacate the third exceptive allegation to the libel on the plea of *res judicata.* The basis of the dismissal and the affirmance is on the authority of *Brailas* v. *United States,* 79 F. Supp. 963, the Court below holding that therefore the within action is *res judicata* by reason of a previous trial against the Polarus Steamship Co. Inc., general agent for the respondent herein, which resulted in a verdict for the defendant.

Facts

On the 7th day of April, 1948, at the time of the civil trial between Cornelius Adriaanse and the General Agent, Polarus Steamship Co. Inc. (41), plaintiff amended his complaint to read that the accident occurred between the *gangway and the deck* in place and stead of between the

gangway and the stanchion (133). Plaintiff testified in accordance with the amended complaint that his accident occurred by reason of the sudden dropping of a gangway which was being moved from one side of the vessel to the other while he was on the deck. Defendant's testimony therein was that the gangway had been stuck in a stanchion and that as the plaintiff attempted to free it by kicking, the gangway suddenly came down upon his foot and caused the injury (61, 62, 116, 117).

In his charge to the jury the learned trial judge stated as follows:

> "The plaintiff has alleged that it happened in a certain manner, and he stands or falls on that. He must satisfy you that he has sustained the injury in substantially the manner in which he claims" (123).

Thereafter the jury retired and then returned for further instructions (52). The forelady stated to the Court that the jurors were under the impression that if the accident happened otherwise than contended by the plaintiff that then he could not recover (53, 54). To this the Court answered:

> "That is right. He comes into Court making a certain claim. If he does not prove it, he cannot recover" (55).

Thereafter, plaintiff's counsel sought to amend the complaint so as to have an alternative pleading which would read that the negligence of the defendant caused the plaintiff's foot to be caught between the gangway and the deck, "or between the gangway and the stanchion." This was not granted (56-59, 63). Thereafter, the jury returned for further instructions and the following transpired:

> "Another juror: In other words, your Honor, the majority of the jury feel that there has been some negligence on the part of the defendant. However, there is quite a bit of doubt as to the nature of the accident. We are inclined to feel there has been some negligence, but because of the charge, since we are not in agreement as to how it occurred, we don't feel we can bring in a verdict for the plaintiff, since there is so much difference as to how the accident occurred, although we are pretty much in agreement that there has been some negligence on the part of the defendant" (60, 61).

Thereafter, the jury returned with a defendant's verdict (132).

The libel herein is not confined to the words "between the gangway and the deck" as appeared in the civil complaint, but in paragraph "Thirteenth" thereof reads as follows:

> "* * * between the gangway and the deck or stanchion" (22-24).

In the reply affidavit of Robert Klonsky in support of the motion to vacate the exceptive allegations and to compel an answer to the libel, the following argument was advanced:

> "From the comments of the jurors, it seems apparent that they believed the defendant negligent in the means followed in moving the gangway from one side of the vessel to the other while the vessel was at sea, but did not believe the plaintiff's version as to how he was hurt.
>
> The Trial Judge refused to permit a further amendment of the complaint after the jury was charged so that it would read in the alternative as

to negligence, thereby covering both the plaintiff's version and what the majority of the jury believed'' (63).

Though both questions were presented to the United States Court of Appeals for the Second Circuit, to wit, whether the decision of this Honorable Court in *McAllister* v. *Cosmopolitan Steamship Co.*, 337 U. S. 783, 93 L. Ed. 1278, decided before the within motion was argued, precludes derivative tort liability as between the general agent and the United States of America, and whether the civil action referred to as the basis of *res judicata* did not concern a cause arising out of the same facts and circumstances, the opinion of the United States Court of Appeals for the Second Circuit concerns itself only with the first question and completely disregards the second.

Specification of Errors to be Urged

The United States Court of Appeals for the Second Circuit erred:

1. In applying the doctrine of *res judicata* to the instant case despite the fact that there was no identity of parties or privies as between the Polarus Steamship Co. Inc. and the United States, and the fact that the liability of the United States was not dependent upon that of Polarus Steamship Co. Inc.

2. In applying the doctrine of *res judicata,* despite the fact that there was no identity of causes of action, since the liability of the United States was entirely different from that relating to Polarus Steamship Co. Inc.

3. In holding that the doctrine of *res judicata* has no definable categories of privity as between defendants, and in extending the doctrine beyond permissible limits prescribed by authoritative decisions.

4. In holding that *res judicata* would apply though there is no mutuality of estoppel, in disregard of the clear decision emanating from this Honorable Court in the case of *Cosmopolitan Shipping Co. Inc.* v. *McAllister, supra.*

5. In holding that the civil action was *res judicata* herein, though the cause herein arose out of different facts and circumstances.

6. In holding that libelant is to be deprived of his constitutional right to a trial by jury despite the outstanding issues between the parties herein which have not heretofore been adjudicated.

7. In affirming the judgment of the district court.

REASONS FOR GRANTING THE WRIT

1. The Court below erred in affirming the dismissal of the libel on the third exceptive allegation asserting *res judicata*, as that which is void *ab initio* may not be construed as legal authority for court action.

The general rule as laid down by the decisions of the Supreme Court of the United States and of the various Circuits, provides that before the doctrine can be applied in any case, it must appear that there is (a) identity of parties or their privies, and (b) identity of cause of action. *Bigelow* v. *Old Dominion Copper Mining Company,* 225 U. S. 111; *Geekie* v. *Kirby C. Company,* 106 U. S. 379; *United Shoe Machinery Corporation* v. *United States,* 258 U. S. 451; *Myers* v. *International Trust Company,* 263 U. S. 64; *Tait* v. *Western Maryland Railway Company,* 289 U. S. 620; *Portland Gold Mining Company* v. *Stratton's Independence,* 158 Fed. 63; *Cragin & Company, Inc.* v. *International Steamship Company,* 15 Fed. (2d) 263. The decision of the Court below disregards the rule laid down by the foregoing authorities and sets up a new doctrine in direct conflict with that

rule, which would leave undefined the criteria essential for the determination of the applicability of the rule. The decision below violates each of the two requisites essential to the application of *res adjudicata.*

The basis of the dismissal by the district court herein was the case of *Brailas* v. *United States,* 79 F. Supp. 963 (136).

When Judge Simon H. Rifkind decided the *Brailas* case on June 2, 1948, he was governed by the law as laid down by the Supreme Court of the United States in the case of *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707. The ship operator was the owner *pro hac vice* in the *Hust* case, *supra,* consequently, an action against the owner *pro hac vice* had to be concluded as an action against the owner.

The United States Supreme Court having reversed the decision of the *Hust* case, *supra,* neither the *Hust* case nor the *Brailas case* which latter case is based on said *Hust* case, may be construed as constituting valid authority for the Court's action.

Since that is no longer the law, the Supreme Court of the United States having reversed itself by its decision in the *McAllister* case, *supra,* (June 27, 1949) the general agent is considered as a separate entity liable for its own personal torts.

The general agent has been held liable as a separate entity by the Supreme Court of the United States in the case of *Brady* v. *Roosevelt Steamship Co.,* 317 U. S. 575, which was affirmed in the *McAllister* case, *supra.*

Polarus Steamship Co. as general agent is neither the respondent herein nor its privy so as to constitute a bar to this action on the essential element in the law applicable to *res adjudicata* requiring identity of parties.

In the absence of derivative tort liability the defense of *res adjudicata* falls. This rule as to *res adjudicata* is expressed in Blashfield's Cyclopedia of Automobile Law and Practice, Volume 9, Section 5835, page 111, as follows:

> "* * * is an exemplification of the broader rule by which one whose liability is wholly derivative may claim the benefit of a judgment in favor of the person from whom his liability is derived, if not based on grounds applicable only to the latter."

If libelant had obtained a verdict against the general agent prior to the decision in the *McAllister* case, *supra*, upon timely appeal, this would have been reversed as in *Casey* v. *American Export Lines, Inc.*, 176 F. (2) 337.

As the converse of the present situation would not have allowed the civil action to be a determination on the merits herein, it follows that neither is the verdict for the defendant *res adjudicata* on the present action by libelant.

The United States is not in the position of a principal who may avail itself of a prior determination in favor of one of its agents through whose act its liability is derived.

Any action against the general agent must be deemed void *ab initio*, and consequently the United States cannot seek the advantage of the prior judgment in favor of the agent, any more than it could seek the advantage of a judgment in favor of any third person against whom, as a matter of law, no judgment could be recovered for the acts complained of.

Proceedings which are void *ab initio* cannot constitute grounds for the decision of the Court below, or for that matter, any decision.

The error of the decision below is clear from an examination of the opinion of the United States Supreme Court

in *Bigelow* v. *Old Dominion Copper Mining Co., supra.* In that case the Court stated as follows (p. 126):

> "To conclude Bigelow by the New York judgment, it must appear that he was either a party or a privy. That he was not a party to the record is conceded. He had no legal right to defend or control the proceedings, nor to appeal from the decree. He was therefore a stranger, and was not concluded by that judgment as a party thereto. That he was indirectly interested in the result because the question there litigated was one which might affect his own liability as a judicial precedent in a subsequent suit against him upon the same cause of action is true, but the effect of a judgment against Lewisohn as a precedent is not that of *res judicata,* and the Massachusetts court was under no obligation to follow the decision as a mere judicial precedent."

The Court then points out the exception to the rule of mutuality, (p. 127):

> "An apparent exception to this rule of mutuality had been held to exist where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit, upon the same facts when sued by the same plaintiff."

In this case the United States was neither a party nor a privy to the civil proceedings herein, and the liability of the United States was not dependent upon nor derived from Polarus Steamship Co. Inc. As there is no identity of parties or privies, and since the liability of the United States is not dependent upon the culpability of Polarus Steamship Co. Inc., which was the party exonerated in the prior suit, there is no basis for the application of the rule of *res judicata,* under the rule of the *Bigelow* case, *supra.*

The principles and reasoning set forth in the Bigelow case have been consistently approved and followed by the most recent pronouncements of this Court on the point. *Hartford Accident & Indemnity Company* v. *Nelson Manufacturing Company,* 291 U. S. 352; *Chase National Bank* v. *City of Norwalk,* 291 U. S. 431.

If this decision is allowed to stand so that a new rule of law is invoked to hold that though there is a lack of mutuality of estoppel nonetheless the doctrine of *res judicata* would apply, then it would be impossible for any Court to state with any degree of certainty whether a given set of facts falls within or without the doctrine of *res judicata,* and it may be assumed that different judges would hold differently under the same set of facts. The issue is one of extraordinary importance and will affect an innumerable number of actions not only in admiralty, but also under the common law.

2. As the factual issue presented in the case at bar was specifically removed from the jury's consideration in the civil action, it follows that the decision of the Court below conflicts with the general rule that there must be identity of causes of action for dismissal under the doctrine of *res judicata.*

The jury in the civil action specifically asked permission to consider the factual issue presented in the case at bar, but the trial judge withheld said issue, and advised the jury that they should not consider it.

In the civil action the jury stated that it found the defendant negligent on the merits pleaded in the libel herein; however the trial judge stated that the jury could not consider said facts as they were not part of the civil complaint.

The libel herein sets forth a separate and distinct count of negligence which was not determined in the civil action

and on which the jury very clearly expressed that if this count of negligence were clear to them, and that they did not have to rely on the plaintiff's version as to how the accident happened, that they would find for the plaintiff.

There is no need to comment on the error of the trial judge's charge in confining the jury's attention to the plaintiff's version of the occurrence of the accident in disregard of the entire record within which the jury found negligence of the defendant. It is significant, however, that by reason of this limitation imposed on the jury by the trial judge, that the facts and circumstances herein were not adjudicated. Consequently the factual issues herein not having been determined in the prior action, the jury's decision below cannot be determined as constituting *res judicata.*

The opinion of the Court below refers to the case of *Bruszewski* v. *United States,* 181 Fed. (2) 419, cert. den. That case is clearly distinguished from the case at bar. The opinion herein holds that Judge Hastie's opinion in the *Bruszewski* case, *supra,* was predicated on the following:

> "His reason apparently was that no unfairness would result from treating the former judgment as an estoppel as against a plaintiff *who had already had full opportunity to prove negligence"* (italics supplied).

In fact, petitioner herein did not have a full opportunity to prove negligence in the civil action.

The general rule is that where two actions do not involve the same claim, demand and cause of action, the doctrine of *res judicata* is not applicable. *Myers* v. *International Trust Company,* 263 U. S. 64. It is essential that there must not only be identity of subject matter, but also identity of cause of action. *United Shoe Machinery Corporation* v. *United States,* 258 U. S. 451.

Under the ruling of the Court below petitioner would be in the ironical position of not being able to make any recovery in his action against Polarus, because he sued the wrong party, and in this action he would be barred because he sued Polarus on an erroneous theory. A day in court presupposes the fact that there was an opportunity to obtain a judgment against a party, against whom the judgment could validly be asserted. Petitioner never had his day in Court.

The Court of Appeals below has invoked a new doctrine which would completely destroy all the safeguards attached to the rule of *res judicata*. Such a substantial departure from the settled law merits the consideration of this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB RASSNER,
Proctor for Libelant-Appellant.

ROBERT KLONSKY, Esq.,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1950

No.

CORNELIUS ADRIAANSE,

Libelant-Appellant,

against

UNITED STATES OF AMERICA,

Respondent-Appellee.

BRIEF IN SUPPORT OF PETITION

This is a petition for a writ of certiorari to review a judgment dismissing the libel upon the denial of libelant's motion to vacate the third respective allegation to the libel. The basis of the dismissal is that the within action is *res adjudicata,* by reason of a previous trial against the Polarus Steamship Co. Inc., general agent for the respondent herein, which resulted in a verdict for the defendant, on the authority of *Brailas* v. *United States,* 79 F. Supp. 963 (136).*

The grounds are two-fold; first, that the civil action referred to in the third exceptive allegation did not concern a cause arising out of the "same facts and circumstances", and second, that by reason of the decision of the United States Supreme Court in *McAllister* v. *Cosmopolitan Steamship Co.,* 337 U. S. 783, 93 L. Ed. 1278, decided before the within motion was argued, there is no derivative tort liability as between the general agent and the United States of America so as to alow the plea of *res adjudicata.*

---

* Numbers are folio references.

POINT I

The Court erred in sustaining the third exceptive allegation asserting *res adjudicata*, as that which is void *ab initio* may not be construed as legal authority for court action.

Brailas v. *United States, supra,* is not authority for the dismissal herein.

When Judge Simon H. Rifkind decided the *Brailas* case (June 2, 1948) he was governed by the law as laid down by the Supreme Court of the United States in the case of *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707. The ship operator was the owner *pro hac vice* in the *Hust* case, *supra,* consequently, an action against the owner *pro hac vice* had to be concluded as an action against the owner.

The United States Supreme Court having reversed the decision in the *Hust* case, *supra,* neither the *Hust* case nor the *Brailas* case, which latter case is based on said *Hust* case, may be construed as constituting valid authority for the Court's action.

Since that is no longer the law, the Supreme Court of the United States having reversed itself by its decision in the *McAllister* case, *supra* (June 27, 1949) the general agent is considered as a separate entity liable for its own personal torts.

The general agent has been held liable as a separate entity by the Supreme Court of the United States in the case of *Brady* v. *Roosevelt Steamship Co.,* 317 U. S. 575, which was affirmed in the *McAllister* case, *supra.*

Polarus Steamship Co. as general agent is neither the respondent herein nor its privy so as to constitute a bar to this action on the essential element in the law applicable to *res adjudicata* requiring identity of parties.

In the absence of derivative tort liability the defense of *res adjudicata* falls. This rule as to *res adjudicata* is expressed in Blashfield's Cyclopedia of Automobile Law and Practice, Volume 9, Section 5835, page 111, as follows:

> "* * * is an exemplification of the broader rule by which one whose liability is wholly derivative may claim the benefit of a judgment in favor of the person from whom his liability is derived, if not based on grounds applicable only to the latter."

If libelant had obtained a verdict against the General Agent prior to the decision in the *McAllister* case, *supra*, upon timely appeal, this Court would have reversed as it did in *Casey* v. *American Export Lines, Inc.*, 176 F. (2) 337.

As the converse of the present situation would not have allowed the civil action to be a determination on the merits herein, it follows that neither is the verdict for the defendant herein *res adjudicata* on the present action by libelant.

The United States is not in the position of a principal who may avail itself of a prior determination in favor of one of its agents through whose act its liability is derived.

Any action against the General Agent must be deemed void *ab initio*, and consequently the United States cannot seek the advantage of the prior judgment in favor of the agent, any more than it could seek the advantage of a judgment in favor of any third person against whom, as a matter of law, no judgment could be recovered for the acts complained of.

Proceedings which are void *ab initio* cannot constitute grounds for the decision of the Court below, or for that matter, any decision.

POINT II

The factual issue presented in the case at bar was specifically removed from the jury's consideration in the civil action.

The jury in the civil action specifically asked permission to consider the factual issue presented in the case at bar, but the trial judge withheld said issue, and advised the jury that they should not consider it.

In the civil action the jury stated that it found the defendant negligent on the facts pleaded in the case at bar; however the trial judge stated that the jury could not consider said facts as they were not the basis of the civil complaint.

The libel herein sets forth a separate and distinct count of negligence which was not determined in the civil action and on which the jury very clearly expressed that if this count of negligence were clear to them, and that they did not have to rely on the plaintiff's version as to how the accident happened, that they would find for the plaintiff.

There is no need to comment on the error of the trial judge's charge in confining the jury's attention to the plaintiff's version of the occurrence of the accident in disregard of the entire record within which the jury found negligence of the defendant. It is significant, however, that by reason of this limitation imposed on the jury by the trial judge, that the facts and circumstances herein weer not adjudicated. Consequently the factual issues herein not having been determined in the prior action, the jury's decision below cannot be determined as constituting *res adjudicata.*

CONCLUSION

Libelant has not had a trial on the merits. The present libel is grounded distinctly on alternative causes of action, on one of which the jury expressed it would have found the libelant in the civil action against the general agent.

Further, as there is no derivative tort liability, the United States of America cannot contend that the judgment in favor of the defendant in the civil action is a bar to the libel herein.

Since the United States Supreme Court reversed the *Hust* decision, which was the authority for the *Brailas* decision, said *Brailas* decision is not authoritative.

Accordingly, it is respectfully urged that the decree dismissing the libel herein be reversed and that the respondent be ordered to file an answer to said libel.

JACOB RASSNER,
Proctor for Libelant-Appellant.

ROBERT KLONSKY,
Of Counsel.